13

No. 03-1238

Supreme Court, U.S.
FILED
MAY 16 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 26, 2004
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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 03-1238 Petition For A Writ Of Certiorari at the following pages:

Alvarez v. *IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003)	1a-34a
Alvarez v. *IBP, Inc.*, No. CT-98-5005-RHW (E.D. Wash. Sept. 14, 2001)	35a-82a

WASHINGTON EASTERN DISTRICT COURT

Case No. 2:98-cv-5005

GABRIEL ALVAREZ, *et al.*,

Plaintiff,

v.

IBP, INC.

Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
06/30/1998	1	COMPLAINT FOR MINIMUM WAGE ACT AND FAIR LABOR STANDARDS ACT VIOLATIONS (Summons(es) issued) Fee-status: pd Receipt #: 039823 (KH) (Entered: 06/30/1998)
		* * * *
08/17/1998	4	Defendant IBP, Inc.'s ANSWER To Plaintiffs' Complaint (ECH) (Entered: 08/18/1998)
		* * * *
03/08/1999	59	First AMENDED COMPLAINT for Minimum Wage Act and Fair Labor Standards Act violations [1-1] (KH) Modified on 04/23/1999 (Entered: 03/08/1999)
		* * * *
05/07/1999	70	ANSWER by defendant IBP Inc to Plaintiff's First Amended Complaint (KH) (Entered: 05/10/1999)

DATE	NO.	PROCEEDINGS
		* * * *
06/11/1999	72	Stipulation re: class certification (KH) (Entered: 06/15/1999)
		* * * *
08/02/1999	101	Response by defendant to Plaintiff's motion to file a second amended complaint [94-1] (KH) (Entered: 08/05/1999)
		* * * *
08/25/1999	102	ORDER Granting Motion to Amend And Class Certification by Judge Robert H. Whaley (granting motion to amend complaint to add class representatives [94-1] granting motion for (order) Resolving Disputed Class Certification Issues [71-1]) (cc: all counsel) (KH) (Entered: 08/26/1999)
09/10/1999	103	Second AMENDED COMPLAINT for Minimum Wage Act and Fair Labor Standards Act Violations [59-1], [1-1] (KH) (Entered: 09/10/1999)
		* * * *
04/12/2001	664	Findings of fact and conclusions of law by Judge Robert H. Whaley; pltfs to submit obj or clarifications to these findings by 4/27/01; proposed jgm ddl 4/27/01; deft obj ddl 5/11/01; rply ddl 5/18/01; following obj hrg to be set; all outstanding motions are denied as moot except mtn #574 to reconsider rest break claims; parties to submit briefing re issue of injunctive relief COB-179-93 (cc: all counsel) (SAP) (Entered: 04/12/2001)
		* * * *

DATE	NO.	PROCEEDINGS
05/18/2001	669	ORDER by Judge Robert H. Whaley granting pltf's motion for reconsideration of rest break claims [574-1]; w/in 3 wks of this order pltfs to brief re evidence & provide damage figures; parties to schedule 1/2 day of trial time (cc: all counsel) (SAP) (Entered: 05/21/2001)
		* * * *
06/26/2001	718	DAMAGES REPORT by plaintiff (attachments not scanned, filed in separate expando file, Vols. 104-105) (LE) Modified on 06/28/2001 (Entered: 06/26/2001)
		* * * *
07/10/2001	775	Revised Damages Reports by plaintiffs {See Expando File for Attachments) (SAP) (Entered: 07/10/2001)
		* * * *
08/03/2001	828	ORDER on Objections by Judge Robert H. Whaley, plaintiff's objections and clarifications to the court's proposed findings is granted in part and denied in part, [ct. rec. 716] defendant's objections and clarifications to the court's proposed findings is granted in part and denied in part [ct. rec.793] (cc: all counsel) (VR) (Entered: 08/03/2001)
		* * * *
08/28/2001	834	Stipulation for Purposes of Facilitating Rest Break Hearing & Admissibility of Overall Damage Calculations (SAP) (Entered: 08/28/2001)

DATE	NO.	PROCEEDINGS

* * * *

09/14/2001 844 Findings of Fact and Conclusions of Law by Judge Robert H. Whaley: pltfs to present proposed jgm consistent with this Order and w/Court's Order on Objections; court will hear tele oral arg on issue of injunctive relief 10/4/01 at 1:30 p.m.; if parties request oral arg in person, they shall notify Courtroom Dep MF by 10/1/01 COB: 182-95 (cc: all counsel) (LE) (Entered: 09/14/2001)

09/14/2001 845 JUDGMENT: by Judge Robert H. Whaley: pltfs recover of dft IBP sum of $3,098,517.00 w/interest thereon at the rate provided by 29 USC 1961, 3.43%. This jgm based on damages calculated through 5/14/00 and is comprised of $1,751,126.00 in Fair Labor Standards Act (FLSA) overtime damages, $156,344.00 in Washington Minimum Wage Act (MWA) overtime damages for periods preceding the FLSA limitations period, $286,119 in MWA minimum wage damages, and $904,928.00 in rest break damages under Washington law (which includes rest break prejudgment interest); pltfs entitled to costs of action and reasonable attys' fees and costs under applicable state and fed law; pltfs to file mtn to establish these attys' fees w/in 4 weeks from entry of this jgm and to file a cost bill with the Clerk (cc: all counsel) COB: 182-94 (LE) Modified on 11/27/2001 (Entered: 09/14/2001)

DATE	NO.	PROCEEDINGS

* * * *

01/18/2002 988 ORDER by Judge Robert H. Whaley granting motion for stay of execution of judgment pending appeal & for approval of supersedeas bond pursuant to FRCP 62(d) & FRAP 8(a)(1) [967-2]; order is without prejudice to any right of pltfs to apply for further relief under FRAP 8(a) (cc: all counsel) (SAP) (Entered: 01/22/2002)

* * * *

02/26/2002 998 REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 9/27/00 Type of Proceeding: Bench Trial, Vol 6 of 43, Pgs 81-162 [See Expando File Vol 113] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)

02/26/2002 999 REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 9/28/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 7 of 43, Pgs 163-243 [See Expando File Vol 113] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)

02/26/2002 1000 REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 9/28/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 8 of 43, Pgs 244-321 [See Expando File Vol 113] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1001	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 9/29/00 Type of Proceeding: Bench Trial, Vol 9 of 43, Pgs 322-480 [See Expando File Vol 113] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1002	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/3/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 10 of 43, Pgs 481-570 [See Expando File Vol 114] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1003	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/3/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 11 of 43, Pgs 571-677 [See Expando File Vol 114] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1004	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/4/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 12 of 43, Pgs 678-771 [See Expando File Vol 114] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1005	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/4/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 13 of 43, Pgs 772-888 [See Expando File Vol 114] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1006	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/5/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 14 of 43, Pgs 889-1020 [See Expando File Vol 114] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1007	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/5/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 15 of 43, Pgs 1021-1109 [See Expando File Vol 115] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1008	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/6/00 Type of Proceeding: Bench Trial, Vol 16 of 43, Pgs 1110-1257 [See Expando File Vol 115] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1009	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/9/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 17 of 43, Pgs 1258-1448 [See Expando File Vol 115] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1010	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/9/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 18 of 43, Pgs 1449-1523 [See Expando File Vol 115] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1011	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/10/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 19 of 43, Pgs 1524-1691 [See Expando File Vol 115] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1012	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/10/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 20 of 43, Pgs 1692-1762 [See Expando File Vol 116] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1013	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/11/00 Type of Proceeding: Bench Trial, Vol 21 of 43, Pgs 1763-1932 [See Expando File Vol 116] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1014	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/12/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 22 of 43, Pgs 1933-2097 [See Expando File Vol 116] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1015	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/12/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 23 of 43, Pgs 2098-2316 [See Expando File Vol 116] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1016	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/13/00 Type of Proceeding: Bench Trial, Vol 24 of 43, Pgs 2317-2501 [See Expando File Vol 117] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1017	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/17/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 25 of 43, Pgs 2502-2601 [See Expando File Vol 117] (SAP) Modified on 02/28/2002 (Entered: 02/27/2002)
02/26/2002	1018	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/17/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 26 of 43, pgs 2602-2674 [See Expando File Vol 117] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1019	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Yakima, WA Date: 10/19/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 27 of 43, Pgs 2675-2814 [See Expando File Vol 117] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1020	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Yakima, WA Date: 10/19/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 28 of 43, Pgs 2815-2966 [See Expando File Vol 117] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1021	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/20/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 29 of 43, Pgs 2967-3137 [See Expando File Vol 118] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1022	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/20/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 30 of 43, Pgs 3138-3262 [See Expando File Vol 118] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1023	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/24/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 31 of 43, Pgs 3263-3405 [See Expando File Vol 118] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1024	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/24/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 32 of 43, Pgs 3406-3547 [See Expando File Vol 118] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1025	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/25/00 Type of Proceeding: Bench Trial, Vol 33 of 43, Pgs 3548-3681 [See Expando File Vol 119] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1026	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/26/00 Type of Proceeding: Bench Trial, Morning Proceedings, Vol 34 of 43, Pgs 3682-3872 [See Expando File Vol 119] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1027	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/26/00 Type of Proceeding: Bench Trial, Afternoon Proceedings, Vol 35 of 43, Pgs 3873-3979 [See Expando File Vol 119] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
02/26/2002	1028	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Richland, WA Date: 10/27/00 Type of Proceeding: Bench Trial, Vol 36 of 43, Pgs 3980-4216 [See Expando File Vol 119] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)

DATE	NO.	PROCEEDINGS
02/26/2002	1029	REPORTER'S TRANSCRIPT FILED. CR: Debra Clark before Judge Robert H. Whaley City: Spokane, WA Date: 11/3/00 Type of Proceeding: Bench Trial, Vol 37 of 43, Pgs 4217-4350 [See Expando File Vol 120] (SAP) Modified on 02/28/2002 (Entered: 02/28/2002)
		* * * *
02/28/2002	1037	Copy 9CCA certificate of record - Original forwarded to 9CCA 9CCA: 02-35042 (SAP) (Entered: 02/28/2002)
		* * * *

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Court of Appeals Docket No. 02-35042

GABRIEL ALVAREZ, individually and as class representatives; RANULFO GUTIERREZ, individually and as class representatives; PEDRO HERNANDEZ, individually and as class representatives; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Plaintiffs-Appellees.

v.

IBP, INC., a Delaware corporation

Defendant-Appellant,

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1/9/02	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): no. setting schedule as follows: appellant's designation of RT is due 1/7/02; appellee's designation of RT is due 1/17/02; appellant shall order transcript by 1/28/02; court reporter shall file transcript in DC by 2/27/02; certificate of record shall be filed by 3/6/02; appellant's opening brief is due 4/15/02; appellees' brief is due 5/15/02; appellants' reply brief is due 5/29/02; [02-35042] (crw) [02-35042]
	* * * *
6/6/02	Filed original and 15 copies IBP, Inc.'s first brief on cross-appeal, (Informal : no) of 60 pages and 2 excerpts of record; served on 6/3/02 [02-35042, 02-35110] (dg) [02-35042 02-35110]

DATE	PROCEEDINGS
	* * * *
7/24/02	Filed original and 15 copies plaintiffs second brief on cross-appeal (Informal : no) of 62 pages and 3 vols excerpts of record; served on 7/22/02 [02-35042, 02-35110] (dg) [02-35042 02-35110]
	* * * *
10/8/02	Filed original and 15 copies IBP, Inc.'s third brief on cross-appeal (Informal : no) of 69 pages and 5 copies 1 excerpts of record; served on 10/4/02 [02-35042, 02-35110] (dg) [02-35042 02-35110]
	* * * *
11/19/02	Filed original and 15 copies IBP, Inc.'s [*sic*] reply brief, (Informal : no) of 30 pages & 5 supp exc of record; served on 11/18/02 [02-35042, 02-35110] (dg) [02-35042 02-35110]
	* * * *
4/22/03	FILED CERTIFIED RECORD ON APPEAL IN: 45 clerk's records, 42 reporter's transcripts, 9 under seal exhibits in envs. From dc transmittal. [02-35042] (jk) [02-35042]
	* * * *
8/5/03	FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each party to bear their own costs. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Dorothy W. NELSON; Sidney R. THOMAS, author; Susan Y. Illston.) FILED AND ENTERED JUDGMENT. [02-35042, 02-35110] (dg) [02-35042 02-35110]

* * * *

11/28/03 Filed order (Dorothy W. NELSON, Sidney R. THOMAS, Susan Y. Illston): . . . . The petn for rhrg is denied and the suggestion for rhrg en banc is rejected. [02-35042, 02-35110] (crw) [02-35042 02-35110]

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

[Filed Sep. 10, 1999]

No. CT-98-5005 RHW
CLASS ACTION

GABRIEL ALVAREZ, VIRGINIA ALVAREZ, MARIA CHAVEZ, RANULFO GUTIÉRREZ, PEDRO HERNANDEZ, MARIA MARTINEZ, RAMON MORENO, and ISMAEL RODRIQUEZ, individually and as class representatives,

Plaintiffs,

v.

IBP, INC., a Delaware Corporation,

Defendant.

SECOND AMENDED COMPLAINT FOR MINIMUM WAGE ACT AND FAIR LABOR STANDARDS ACT VIOLATIONS

Jurisdiction

1. The Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 216(b) over plaintiffs' Fair Labor Standards Act, 29 U.S.C. §§ 201-219 ("FLSA") claims. The Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over plaintiffs' state law claims which are based on the Minimum Wage Act, RCW chapter 49.42 ("MWA"), Industrial Welfare Act, RCW chapter 49.12, Wages-Deductions-Contribution-Rebates Act, RCW chapter 49.52 and regulations issued thereunder.

Parties

2. Plaintiffs Gabriel Alvarez, Maria Chavez, Ranulfo Gutierrez, Pedro Hernandez, Maria Martinez, Ramon Moreno,

and Ismael Rodriquez are adults employed at defendant's Pasco, Washington plant and have been so employed during the three years prior to the filing of this complaint. Virginia Alvarez is adult who was employed at defendant's Pasco, Washington plant from approximately 1991 until early 1999.

3. Defendant IBP, Inc. is a Delaware Corporation headquartered in Dakota City, Nebraska. It is the world's largest producer of fresh beef, pork and related allied products. It operates a beef slaughtering and processing plant that it commonly refers to as its Pasco plant.

Facts

4. Plaintiffs are employed by defendant at its Pasco plant, with the exception of Virginia Alvarez whose employment with defendant ceased in early 1999.

5. Plaintiffs have been employed by defendant at the Pasco plant for periods ranging from approximately 5 years to more than 15 years.

6. During the past 5 to 15 years, plaintiffs have worked and continue to work in the Pasco plant processing or slaughtering divisions.

7. Plaintiffs are employed and have been employed by defendant during the past three years in an enterprise engaged in commerce and in the production of goods for commerce, as these terms are used in Sections 6 and 7 of the FLSA, 29 U.S.C. §§ 206-207.

8. Plaintiffs perform unpaid work each morning, including, but not limited to, activities such as donning protective equipment (wire mesh gloves, wire mesh aprons, protective sleeves, rubber gloves, cloth gloves, plastic gloves, safety boots, scabbards, hard hats, safety glasses, hairnet, earplugs and other equipment), receiving and donning outer gloves, obtaining sand paper, obtaining knives, sanding their steel (equipment used to sharpen knives), waiting in line during these previous activities, and performing production floor work.

9. Plaintiffs have thirty-minute meal periods deducted from their pay, even though a substantial amount of their meal period is devoted to work activities such as production floor work after the start of the meal period, doffing safety equipment and related garments, cleaning themselves and equipment, donning safety equipment and related garments, and returning to work on the production floor prior to the end of the thirty-minute meal period.

10. Plaintiffs work more than 8 hours in a day without receiving a second paid rest break.

11. Plaintiffs perform unpaid work after the official end of the paid work day, including but not limited to activities such as completing production floor work, doffing safety equipment and related garments, cleaning safety equipment, bagging gloves and garments, storing safety equipment in lockers and waiting in line at various steps in the above-described process.

12. Plaintiffs clock in at or near the beginning of the workday and clock out at or near the end of their workday, but are paid based on the official start and stop time, which excludes work performed before and after official hours.

13. Much of plaintiffs' off-the-clock work is performed in workweeks in which plaintiffs work in excess of forty hours.

14. Plaintiff Ramon Moreno works in the slaughter division and for approximately 2 years has worked under an incentive wage, where employees are paid a daily productivity bonus to the extent that they complete assigned work in advance of allowed time for the work. That productivity bonus is not included as part of Mr. Moreno regular rate of pay for purposes of calculating state and federal overtime premium pay.

15. Plaintiffs have been and continue to be subject to a rule under which deductions are made from their wages for company equipment that is lost or stolen without their being involved in any dishonest or willful act. For example, in July 1996, plaintiff Ranulfo Guttierez suffered such a $197 equipment deduction that brought his pay to below state and federal minimum wage. The equipment deduction does not accrue to the benefit of the plaintiffs. Instead, the employer derives a financial benefit by obtaining wage rebates to cover missing company equipment, much of which is found and used in production work without reimbursing the employees who paid for the equipment.

16. The events described hereinabove were continuing at the time of the complaint and amended complaint, and, on information and belief, will continue.

17. Defendant has been and continues to willfully violate state and federal wage and hour statutes and regulations with the intent to deprive plaintiffs of a part of their wages.

18. Defendant has been engaged in extensive similar litigation with the United States Department of Labor and with private parties, resulting in final judgment affirmed in *Metzler v. IBP, Inc.*, 127 F.3d 959 (10th Cir. 1997) and *Bernard v. IBP, Inc.*, 154 F.3d 259 (5th Cir. 1998), such that collateral estoppel should be applied against defendant from these judgments and other judgments presently unknown to plaintiffs on issues that will likely arise during this litigation.

Class Facts

19. Plaintiffs file this action on behalf of themselves and a class defined as follows:

> All individuals performing production work in defendant's Pasco plant processing and slaughtering divisions, during any time between June 30, 1995 to the present time, excluding supervisors, managers, quality control

> employees, guards, mechanics, laundry room employees, janitors, knife room employees, rendering employees, and packaging work performed outside the production line vicinity.

20. Class members are employed and have been employed by defendant during the past three years in an enterprise engaged in commerce and in the production of goods for commerce, as these terms are used in Sections 6 & 7 of the FLSA, 29 U.S.C. §§ 206-207.

21. Class members perform unpaid work each morning, including, but not limited to, activities such as donning protective equipment (wire mesh gloves, wire mesh aprons, rubber aprons, protective sleeves, rubber gloves, cloth gloves, plastic gloves, safety boots, scabbards, hard hats, safety glasses, hairnets, ear plugs and other equipment), receiving and donning outer gloves, obtaining sand paper, obtaining knives, sanding their steel (equipment used to sharpen knives), waiting in line during these previous activities, and performing production floor work.

22. Class members have thirty minute meal periods deducted from their pay, even though a substantial amount of their meal period is devoted to work activities such as production floor work after the start of the meal period, doffing safety equipment and related garments, cleaning themselves and equipment, donning safety equipment and related garments, and returning to work on the production floor prior to the end of the thirty-minute meal period.

23. Class members work more than 8 hours in a day without receiving a second paid rest break.

24. Class members perform unpaid work after the official end of the paid work day, including but not limited to activities such as completing production floor work, doffing safety equipment and related garments, cleaning safety equipment, bagging gloves and garments, storing safety equipment

in lockers and waiting in line at various steps in the above-described process.

25. Class members clock in at the beginning of their work day and clock out at the end of their work day, but are nonetheless paid based on the official start and stop time, which excludes work performed before and after official hours.

26. Much of the class members' off-the-clock work is performed in workweeks in which class members work in excess of forty hours.

27. For approximately two years, class members in the slaughter division have worked under an incentive wage, where employees are paid a daily productivity bonus to the extent that they complete assigned work in advance of allowed time for the work. That productivity bonus is not included as part of the employees' regular rate of pay for purposes of calculating state and federal overtime premium pay.

28. Class members have been and continue to be subject to a rule under which deductions are made from their wages for company equipment that is lost or stolen without their being involved in any dishonest or willful act. Such deductions sometimes reduce pay to below state and federal minimum wage. The equipment deduction does not accrue to the benefit of the plaintiffs. Instead, the employer derives a financial benefit by obtaining wage rebates to cover missing company equipment, much of which is found and used in production work without reimbursing the employees who paid for the equipment.

29. The events described hereinabove were continuing at the time of filing of the complaint and first amended complaint, and, on information and belief, will continue.

30. Defendant has been and continues to willfully violate state and federal wage and hour statutes and regulations with the intent to deprive class members of a part of their wages.

31. Defendant has been engaged in extensive similar litigation with the United States Department of Labor and with private parties, resulting in final judgment affirmed in *Metzler v. IBP, Inc.*, 127 F.3d 959 (10th Cir. 1997) and *Bernard v. IBP, Inc.*, 154 F.3d 259 (5th Cir. 1998), such that collateral estoppel should be applied against defendant on these judgments and other judgments presently unknown to the class members on issues that will likely arise during this litigation.

32. The proposed class numbers in excess of 2,000 individuals and, therefore, joinder of all members is impracticable.

33. There are questions of law and fact common to the class.

34. Virtually all legal issues in this case will be common class issues, such as state law lunch and rest break issues, MWA statute of limitations issues, legal similarities and dissimilarities between the MWA and FLSA, FLSA work and Portal-to-Portal act issues, FLSA meal break issues, interpretation of 29 U.S.C. § 203(o), deference to be given to the Wage and Hour Opinion entitled "Hours Worked/Cleaning, Putting on Safety Gear" (December 3, 1997), collateral estoppel issues based on *Metzler v. IBP, Inc.*, and *Bernard v. IBP, Inc., supra*, legal issues raised by affirmative defenses advanced by defendant, and other legal issues which will arise during this litigation.

35. Class members share numerous common issues of fact, involving matters such as amounts of time it takes to do various activities, the time that production floor work begins and ends in relation to paid starting and stopping time, liability and damages issues which will be tried applying

MWA and FLSA principles of representative evidence, and the willfulness of defendant's violations for purposes of RCW 49.52.050 & .070 exemplary damages and the FLSA 3-year statute of limitations, 29 U.S.C. § 254.

36. The claims of the representative parties are similar to the class claims. See allegations *supra* and *infra*.

37. The named plaintiffs will fairly and adequately protect the interests of the class and have made arrangements with experienced counsel to represent the class members with vigor and zeal within the bounds of the law.

38. The questions of law and fact common to the members predominate over any questions affecting only individual members, particularly in light of the rules of representative evidence and the relaxed burdens of proof in MWA and FLSA cases.

39. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

40. Individual class members have little interest in individually controlling the prosecution of their claims given the relatively small amounts of each claim, their relative lack of sophistication, and the difficulties involved in bringing individual litigation against one's current employer.

41. Plaintiffs are unaware of any other litigation concerning this controversy commenced by or for other class members.

42. This litigation should be concentrated in this forum because all class members were employed in defendant's Pasco plant, located within this forum.

43. The Court has the resources, abilities and procedures to effectively manage this class action, particularly with application of the substantive wage and hour law of representative evidence and relaxed burdens of proof.

44. Defendant has been and continues to willfully violate state and federal wage and hour statutes and regulations with the intent to deprive class members of a part of their wages.

First Claim—State Wage and Hour Law Violations

45. Plaintiffs repeat and reallege the prior allegations of the complaint as if repeated completely.

46. Defendant violates RCW 49.46.020 by permitting unpaid work to be performed prior to and after the start of the paid workday.

47. Defendant violates RCW 49.46.130 by permitting plaintiffs and class members to perform off-the-clock overtime work, *i.e.*, unpaid work performed by an employee who has worked in excess of forty hours during a week.

48. Defendant violates RCW 49.46.130 by failing to include slaughter division incentive pay as part of the regular rate for purposes of calculating overtime premium pay.

49. Defendant violates RCW 49.46.020, RCW 49.46.130, RCW 49.12.005 and WAC 296-126-092 by failing to pay for meal breaks that are less than 30 minutes, the minimum length for an unpaid meal break under state law.

50. Defendant violates RCW 49.12.005 and WAC 296-126-092 by failing to provide a second 10-minute rest break on days when plaintiffs work 8 hours or more.

51. Defendant violates RCW chapter 49.12, RCW 49.52.050-49.52.070 and, WAC 296-126-025 by deducting the cost of lost or stolen equipment from wages of employees who have not been engaged in any dishonest or willful act relative to the lost or stolen equipment, a deduction that is not for the benefit of employees and on which defendant derives financial gain. Defendant violates RCW 49.46.020 when the deduction brings the employee's realized wages below minimum wage.

52. Defendant violates RCW 49.52.050 and RCW 49.52.070 by willfully and with intent to deprive class members of wages, failing to pay wages owed pursuant to statute.

Second Claim—Fair Labor Standards Act Violations

53. Plaintiffs repeat and reallege the prior allegations of the complaint.

54. Plaintiffs and class members are similarly situated with regard to the claims made in this complaint.

55. Defendants violates Section 6 of the FLSA, 29 U.S.C. § 206, by deducting equipment cost from wages and not paying for hours worked, when the net effect of these violations is to effectively reduce the employee's average hourly earnings for the workweek to below the FLSA minimum hourly wage.

56. Defendant violates the overtime provisions of Section 7 of the FLSA, 29 U.S.C. § 207, by permitting unpaid overtime work, including unpaid overtime work prior to the start of the paid work day, during meal periods that do not qualify as bona fide meal periods pursuant to FLSA regulations and case law, and after the end of the paid work day.

57. Defendant violates the overtime provisions of Section 7 of the FLSA, 29 U.S.C. § 207, by failing to include slaughter division incentive pay in the regular rate for purposes of calculating the overtime premium.

Prayer for Relief

Wherefore, plaintiffs, individually and on behalf of the class, pray for relief as follows:

1. With regard to the state law claims, plaintiffs pray for Fed.R.Civ.P. 23(b)(2) and 23(b)(3) class certification, damages, exemplary damages, prejudgment interest, costs, attorney fees pursuant to RCW 49.46.090, RCW 49.48.030, RCW

49.52.070 and equitable grounds, and for such other and further relieve[sic], including final injunctive relief, as the Court deems just and equitable;

2. With regard to the FLSA claims, plaintiffs pray for FLSA class certification pursuant to 29 U.S.C. § 216(b), damages, liquidated damages, prejudgment interest, costs, attorney fees pursuant to 29 U.S.C. § 216(b), and such other and further relief as the Court deems just and equitable.

DATED this 20th day of July 1999.

LAW OFFICE OF DAVID N. MARK

/s/ David N. Mark
by: DAVID N. MARK (WSBA #13908)

SCHROETER, GOLDMARK & BENDER

/s/ William J. Rutzick
by: WILLIAM J. RUTZICK (WSBA# 11533)
Attorneys for the Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

[Filed Aug. 3, 2001]

NO. CT-98-5005-RHW

GABRIEL ALVAREZ, *et al.*,
Plaintiffs,

v.

IBP, INC., a Delaware corporation,
Defendant.

ORDER ON OBJECTIONS

A hearing was held on July 27, 2001. Before the Court are Plaintiffs' Objections and Clarifications to the Court's Proposed Findings (Ct. Rec. 716) and Defendant's Objections and Clarifications to the Court's Proposed Findings (Ct. Rec. 793). Plaintiffs were represented by William Rutzick; Defendant by Barbara Duffy and Nancy Anderson. This will memorialize the Court's oral rulings.

DISCUSSION

I. Plaintiffs' Objections

A. Meal Break Damages

Plaintiffs request that the Court clarify or, in the alternative, reconsider its Findings and Conclusions related to the amount of recovery for meal-break violations. Plaintiffs contend that the entire 30 minutes of the meal break should be recovered. Additionally, Plaintiffs argue that *Wingert v. Yellow Freight*, 104 Wash. App. 583 (2000), which holds that WAC 296-126-092 does provide a private right of action for rest break violations, also would apply to meal-break violations and, therefore, recovery of the full 30 minutes is required.

The Court clarifies its conclusion to only allow recovery for the time spent working during the meal break up to 10 minutes under the state law claim. If the time spent working during the meal break exceeds 10 minutes, so that the total uninterrupted meal break is less than 20 minutes, the entire 30 minute period shall be recoverable. This conclusion is based on the fact that the Plaintiffs' claim under the MWA is brought to compensate employees for time worked for which they were not compensated. The interpretive guideline under the WAC 296-126-092 indicates that if an employee works during the meal period, the period is to be extended to give the employee a 30-minute meal break. This indicates to the Court that the purpose of both the MWA and the regulation are to allow for time as a remedy for a violation, not necessarily monetary compensation for the entire meal break, when only a portion of the meal break is spent working. This finding is also consistent with the FLSA provision for meal-break violations.

B. Class Work Codes

Plaintiffs move for the class member damages to be based on work codes set forth in exhibits 74 and 75, which were the documents relied upon in the Proposed Findings, and wish to include those codes in "exhibit 1048 and the record herein." Ex. 1048 was a stipulated exhibit, which set forth which packaging department jobs are in the class and which are not. IBP does not object to the inclusion of packaging jobs referenced in exhibit 1048, and these work codes will be included.

Additionally, Plaintiffs wish to include class codes that are not in exhibits 74, 75, and 1048, but which were testified to at trial and are contained in exhibits. These codes involve saw operator jobs and other jobs appearing on IBP's list of jobs (Ex. 369a and 370a-d) and were testified to by Superintendents Salter and Johnson. Plaintiffs are permitted to rely upon representative testimony to establish the equipment used

and work performed by class members in job codes, as long as the evidence was introduced at trial. Plaintiffs provided a list in Appendix A, which includes references to testimony and exhibits that support inclusion of these job categories. These work codes will be included if admissible evidence was introduced at trial about the job so that the appropriate equipment can be determined from the admitted evidence.

Defendant objects on the grounds that because the Court ordered that damages should be awarded on an individualized basis, the Plaintiff should not be able to use representative evidence to demonstrate what work was performed by what job codes. This argument rests on a fundamental misunderstanding of the Court's proposed Findings and Conclusions. The Court's proposed Findings and Conclusions, although concluding that damages should be determined on an individualized basis, also held that the foundation for determining what job categories were entitled to damages and in what amount, were to be determined by reference to the representational evidence. The Court held that the representational evidence was adequate to determine what work was done and in what amounts. To read the Court's holding consistent with the Defendant's interpretation would mean that only those Plaintiffs who testified at trial are entitled to recovery. That was clearly not the Court's intent. As the Court stated in the Proposed Findings and Conclusions "the documentary and expert testimony provide the evidence for jobs not testified to by employees. IBP documents identify which jobs at the Pasco plant require protective equipment. (Ex. 74.) Documents also identify jobs for which protective equipment is not required. (Ex. 75.) Internal documents demonstrate which equipment must be removed prior to employees going to lunch or to break. (Exs. 82 and 83.) Other evidence presented indicated which jobs require which items of personal safety equipment. (Exs. 90-93.) Plaintiffs' expert developed average observed times for most activities performed by employees. (Ex. 1035.) Both IBP's and Plaintiffs'

experts performed auditing exercises for certain activities for each position. (Ex. 358-363.)" What the Court intended by referencing individualized damage calculations was to develop more narrow categories than the ones proposed by the parties, of slaughter and processing or knife-carrying and nonknife-carrying job categories. The Court believes that the evidence presented at trial allows for more narrow definitions of job categories, and that calculating damages on the more narrow categories is the most accurate method of determining damages. It was for this reason that the Court determined that the day began with the donning of the first compensable piece of equipment, and also allotted average times for various equipment donning and doffing. It was also for this reason that the Court indicated that even as to jobs for which there was no testimony, recovery would be permitted and could be determined from the expert testimony and trial exhibits.

C. Damage Calculations

Plaintiffs' damage calculations are based on CD-ROM data through January 30, 2000 and the Mobius payroll data from February 6, 2000 to May 14, 2000.

1. Dr. Abbot's calculations

Defendant objects to the use of Dr. Abbot's calculations on the grounds that the calculations are new evidence. The Court overrules this objection. Defendant argues that the calculations are based on new evidence, new job codes, new assumptions about minimum equipment requirements, and new testimony from class members. The Court has resolved these issues and determines that Dr. Abbot is simply using the information already in evidence and ruled on by this Court to determine damage calculations. Furthermore, according to Dr. Abbot, the Mobius data includes the same information as the CD-ROM, (which was admitted into evidence) but, unlike the CD-ROM, it covers pay periods after January 30, 2000.

Dr. Abbot's manipulation of the admitted data is not new evidence. If the Defendant has objections to the calculations the Court will consider a motion to repopen the testimony on this limited issue.

2. Mobius Data

Defendant objects that Plaintiffs failed to identify what Mobius data they intend to rely upon to form the basis for judgment from January 30 through May 14, 2000, and that Mobius data for the 4 months from January 30, 2000 to May 14, 2000 was never introduced at trial and never admitted into evidence. Defendant asserts that this evidence was not produced by IBP, as it was altered by counsel for Plaintiffs at one time. The Court overrules these objections. Plaintiffs identify Exhibit 178(b), which indicates that it calculates damages for "[w]eek ending dates February 6, 2000 through May 14, 2000 based upon Mobius (PFA) reports." If, after the re-calculations have been performed, the Defendant identifies problems in the data or calculations for the Court, the Court will consider a motion to reopen the testimony on this limited issue.

3. Pre-judgment Interest

Prejudgment interest is allowable only when (1) an amount claimed is "liquidated;" or (2) the amount of an "unliquidated" claim is for an amount of money that is "determinable by computation with reference to a fixed standard contained in [a] contract, without reliance on opinion or discretion." *Prier v. Refrigeration Eng'g Co.*, 74 Wash. 2d 25, 32, 442 P.2d 621 (1968). A "liquidated" claim is defined as one whose "exact amount is fixed and known." *Prier*, 74 Wash. 2d at 32, citing Charles T. McCormick, Damages (Hornbook Series), § 54 (1935); *See also Taylor v. Shigaki*, 84 Wash. App. 723, 732 (1997). Defendant argues that the meal-break claims are not for a sum determinable without reliance on opinion or discretion as there is no precedent in this area. This argument rests on a misperception of the requirement of a

fixed standard and of what pre-judgment interest is designed to accomplish.

Prejudgment interest is not awarded only in those cases where the law is clear on whether the amount claimed is owed but, rather, once it is determined that the amount is owed, whether the amount can be determined with exactness. "The fact that a dispute exists over all or part of a claim does not make the claim unliquidated. This is true 'even thought the adversary successfully challenges the amount and succeeds in reducing it.'" *Aker Verdal v. Neil F. Lampson, Inc.*, 65 Wash. App. 177, 190 (1992), quoting *Pier* at 33. "It follows from the foregoing that, where the amount sued for may be arrived at by a process of measurement or computation from the data given by the proof, without any reliance upon opinion or discretion after the concrete facts have been determined, the amount is liquidated and will bear interest." *Prier* at 33-34. Here, the amount of recovery for the time spent working during the meal period is the time spent working, and if that time extends beyond 10 minutes, the entire 30-minute period is recoverable. The compensable time is easily determined by looking to the pay rates for employees and calculating the time spent working during the meal break on days where a meal break was required. Finally, prejudgment interest is not to punish Defendant but, rather, to compensate the Plaintiffs for money wrongfully withheld. "Prejudgment interest is not a penalty imposed on a defendant for wrongdoing nor is its purpose to deter wrongdoing." *Hansen v. Rothaus*, 107 Wash. 2d 468, 475 (1987).

Defendant claims that pre-judgment interest is also part of the Plaintiffs' damage calculation on the rest break—this will be addressed at the hearing on the rest break evidence.

4. Damages to May 14, 2000—No Judgment Bar Thereafter

Plaintiffs indicate that they have detailed electronic payroll data only through the week ending May 14, 2000, which was

near the end of discovery. They request that the Court's final findings calculate damages through this period and hold that work performed thereafter is not being subject to any judgment bar. Plaintiffs are capable of running projections, but do not want to do so as it raises various issues for appeal. Defendant objects to Plaintiffs' damage calculations, which would allow a future supplemental order as the Court's findings in this case would not be a final order. The Court will issue a final judgment on the issue with damages calculated through May 14, 2000. The Court will not hold that work performed thereafter is or is not subject to any judgment bar.

5. May Provide Duplicate Recovery

Defendant objects that Plaintiffs' damage calculations may provide for duplicate recovery under FLSA and MWA because where the MWA damages are not higher than the FLSA damages, Dr. Abbot has applied a calculation to attempt to factor in the MWA's statute of limitation and other differences with the FLSA. Defendants argue that this results in a rough estimate, in violation of the individualized damages notion. As outlined above, the Court does not see a rough estimate of damages a violation of its order that damages should be considered on an individualized basis. However, the Court reiterates that Plaintiffs are entitled to recovery on one theory only.

D. Equipment Beyond the Minimal Equipment List

Plaintiffs have matched work codes with the equipment sets in IBP's Required Equipment Lists in Exhibits 90-93. Plaintiffs also indicate that certain job codes require additional safety equipment, which is not identified on IBP's Required Equipment List, but about which there was testimony and other evidence introduced at trial. Plaintiffs seek to have these other activities included in damages calculations. The requested additional activities are outlined below. The Court finds that the representational testimony was adequate

in proving what additional equipment was required beyond the Required Equipment Lists. As the Court indicated in its Proposed Findings and Conclusions on the representational evidence, "[t]he combination of this evidence convinces the Court that employees have, in fact, performed work for which they were improperly compensated, and that they have produced sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."

While the Court concluded that the MWA and the FLSA protect individual rights and that damages should be calculated on an individualized basis, it also determined that it was satisfied by the amount and quality of representational evidence and that it was "untroubled here, based on the combination of employee testimony, documentary evidence, and expert testimony." *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (holding that while the testimony of the five employee witnesses was inconsistent in terms of exact days and hours of overtime, they had established "'as a matter of just and reasonable inference' that all of the employees regularly worked over eight hours on weekdays and over six hours on many Saturdays.")

"The employee testimony established that pre- and post-shift and meal-time work activities were unpaid, what activities were being performed during these times, and the time each activity takes to complete. Just over 40 employees of IBP's Pasco Plant testified at trial; 25 employees from the Processing Division testified, and employees from the Slaughter Division testified to over 40 job positions. Each employee testified to their various pre- and post-shift activities, as well as their donning and doffing practices during the 30-minute meal break period. While it is true that employees vary in some of the equipment they are required to don and doff, each employee spent some uncompensated time both pre- and post-shift and during the 30-minute meal break. Most employees share at least some of the required protective

equipment." The Court also had the benefit of visiting and viewing the operations at the IBP Plant in Pasco, Washington.

1. Scabbards and steels in straight knife user equipment sets.

The Court grants Plaintiffs' request to include scabbards and steels in straight knife user equipment sets. Straight knife usage is determined from the record of testimony from Salter and Johnson. Defendant does not object to this inclusion.

2. Two cloth gloves for every job code in processing.

Plaintiffs' request to include two cloth gloves for every job code in processing is granted. Defendant objects and cites to the Plaintiffs' excluded declarations, which do not indicate cloth gloves on equipment lists. The Court will include the two cloth gloves, as the evidence at trial was that the gloves are "integral and indispensable." As the Court indicated in its proposed findings "[t]he workers testified that they could not hold the knives safely without the clean gloves because of the blood and fat that made them slip. Many workers changed their gloves multiple times a day in order to keep them clean. Some had as many as six to eight pair that they changed throughout the day. In addition to safety concerns, the employees testified that the gloves were necessary as insulation from the cold of the refrigerated carcasses and the cold temperature of the processing floor. Cold hands made it more dangerous to use knives, saws, and other types of cutting equipment."

3. Three cloth gloves for knife users in processing.

Plaintiffs' request to include three cloth gloves for knife users in processing is granted. The Defendant objects on the grounds that these are not indicated in the Plaintiffs' excluded post-trial declarations. Plaintiffs have identified particular page numbers of testimony and equipment list exhibits, which indicate three cloth gloves were used by knife carriers in

processing. (Maria Salvi p. 31, 41-42, 43-44, 45-46, Ex. 1000; Rufino Vasquesz p. 30, Ex. 1001; Modesto Reynaga p. 14-15, Ex. 1002; Martina Sanchez p. 15, Ex. 1004.) Defendant points to no admitted evidence that refutes that knife users in processing do not use three cloth gloves.

The Court finds that three cloth gloves are "integral and indispensable" to knife users in processing, and this time is compensable.

4. A rubber apron for saw operators in processing.

Plaintiffs' request to include a rubber apron for saw operators in processing is granted. The Defendant objects on the grounds that this information is, again, not indicated in the Plaintiffs' excluded declarations of saw operators. Plaintiffs have identified particular page numbers of testimony and equipment list exhibits which indicate a rubber apron was worn by saw operators. (Jose Zamora p. 47, Ex. 1003; Victor Rangel Ex. 1016; Pedro Piceno p. 18.) Defendant points to no admitted evidence that refutes that saw operators in processing wear rubber gloves. The Court finds a rubber apron is "integral and indispensable" to saw operators in processing, and this time is compensable.

5. Two yellow plastic sleeves and a weight belt for packaging workers in processing.

Plaintiffs' request to include two yellow plastic sleeves and a weight belt for packaging workers in processing is granted in part and denied in part. The Defendant objects on the grounds that this equipment is not required, and that many of Plaintiffs' excluded declarations cite only one or the other. The Court concludes that two yellow plastic sleeves are "integral and indispensable" to packaging workers in processing, and that this time is compensable, but does not find the same for the weight belt, as testimony regarding the weight belt varied for individual workers.

6. Two rubber gloves to workers on the hamburger codes in processing.

Plaintiffs' request to include two rubber gloves for workers on the hamburger codes in processing is granted. Defendant objects again, pointing to Plaintiffs' excluded declarations. Plaintiffs have identified particular page numbers of testimony and equipment list exhibits that indicate hamburger workers in processing wear two rubber gloves. (Maria Espinoza p. 13, Ex. 1023; Sofia Gutierrez, Ex. 1014; Victoria Vaca, Ex. 1019.) Defendant points to no admitted evidence that refutes that hamburger workers in processing wear two rubber gloves. The Court finds that two rubber gloves are "integral and indispensable" to workers on the hamburger codes in processing and this time is compensable.

7. Two cloth gloves to steam vac operators in the slaughter division.

Plaintiffs' request to include two cloth gloves to steam vac operators in the slaughter division is granted. Plaintiffs have identified particular page numbers of testimony and equipment list exhibits that indicate steam vac operators in the slaughter division wear two cloth gloves. (Patsy Tovar p. 16-17; Ex. 1039; Rosario Robles Ex. 1042; Enedina Ramirez p. 14, Ex. 1043.) Defendant points to no admitted evidence that refutes that steam vac operators in the slaughter division wear two cloth gloves. The Court finds that two cloth gloves are "integral and indispensable" for steam vac operators in the slaughter division, and that this time is compensable.

8. Two rubber gloves and a rubber apron to straight knife, whizzard, and air knife users in slaughter.

Plaintiffs' request to include two rubber gloves and a rubber apron to straight knife, whizzard, and air knife users in slaughter is granted. Plaintiffs have identified particular page numbers of testimony and equipment list exhibits which in-

dicate that particular knife users in slaughter wear two rubber gloves and a rubber apron. (Air Knife Users—Arturo Aguillar Ex. 1034; Miguel Lopez Ex. 1033; Luis Moreno p. 34, Ex. 1024, Antonio Martinez p. 7, Ex. 1045; Rosario Robles, p. 6, Ex. 1042; Jose Santiago Ex. 1027. Knife Users Patsy Tovar p. 5, 11, Ex. 1039; Miguel Alvarado Ex. 1030; Paz Arroyo Ex. 1041; Cruz Escobar Ex. 1029; Pedro Galvan, Ex. 1047; Salvador Guzman Ex. 1031; Miguel Lopez Ex. 1033, etc.) Defendant points to no admitted evidence that refutes that knife users in slaughter wear two rubber gloves and a rubber apron. The Court finds that two rubber gloves and a rubber apron are "integral and indispensable" to straight knife, whizzard, and air knife users in slaughter, and that this time is compensable.

F. Allocation of Activities to Work Codes

1. Walk time from the locker to work station and work station to locker

Defendant objects to walk time from the locker to work station and work station to locker for all class members. The Court rejects this objection as to employees who wear compensable protective equipment. As noted in the proposed findings, most processing and slaughter employees don compensable safety equipment in the locker room. Thus, if the employees' first compensable activity is donning equipment in the locker room, they are to be compensated from then on. As the Court's Findings and Conclusions held

> [t]he employee is, thus, to be paid upon arrival at his or her locker when he or she dons his or her first piece of compensable safety equipment. The employee's day ends when he or she has washed and removed his or her last piece of equipment and placed it in his or her locker. The employer has chosen to store the items in the employees' lockers and, thus, the employees will be paid from the time of arrival at their locker until the last piece

> of equipment is put away. This time is not based on a locker-to-locker theory of the work day, but rather on the reality that the worker dons his or her first piece of equipment upon arrival at his or her locker.

The Court finds that this time is not compensable for cloth glove wearers who do not wear any other compensable equipment. These employees are to be compensated for the time spent waiting for gloves and from then on, including walking from the cafeteria, where gloves are retrieved, to the work station.

Defendant seeks to exclude walk time to the cafeteria to get gloves from processing employees who are compensated for locker-to-work-station walk time. Defendant identifies these as mostly knife-carriers. The Court rejects this objection, as the evidence demonstrated that the gloves were distributed in the cafeteria, and that employees were required to go their locker and then go to the cafeteria to retrieve gloves. Since compensable time begins with the donning of compensable equipment at the locker, walk time to the cafeteria to get gloves is included for processing employees, except B-shift employees, who only wear gloves, where the evidence indicated that employees do not wait to get gloves in the cafeteria[1]. As the Court held in its Findings and Conclusions "[w]alking time is compensable if it occurs after the start of the work day. 29 U.S.C. § 254(a). Walking time is excluded under the Portal to Portal Act only if it occurs 'either prior to the time on any particular work day at which such employee commences, or subsequent to the time on any particular work day at which he ceases, such principal activity or activities.' *Id.* The work day begins with the commencement of an employee's principal activity or activities and ends with the completion of the employee's activity; thus, the inclusion of Dr. Mericle's walking time as compensable time."

[1] Although the Court does hold that these employees are entitled to compensation for time waiting to get gloves.

3. [sic] Walk from work station to cafeteria and walk from cafeteria to work station

Defendant objects to the inclusion of time for walking from work station to cafeteria and walking from cafeteria to work station to all class members. IBP argues that walking to the cafeteria at meal break is primarily for the employees' benefit, per *Anderson v. Mt. Clemons Pottery Co.*, 69 F. Supp. 710, 719 (1947) and is, therefore, not compensable. The Court accepts this objection, in part, and orders that employees will not be compensated for walk time to the cafeteria at the meal break, but will be compensated for the time it takes to don and doff equipment during the meal break.

4. Wait for wash to all class members

Defendant objects to wait for wash time to all class members. Where any compensable equipment is required, wait for wash time will be included. The Court will not limit wait to wash time to mesh equipment. The Court found that workers "hose down and scrub aprons, sleeves, rubber gloves," and the evidence indicated an average wait for wash time is required. Wait to wash time shall be given to all employees wearing compensable protective equipment.

5. Wash and Clean Equipment

Defendant objects to the wash and clean equipment time for all class members. Where any compensable equipment is required, wait for wash time will be included. The Court will not limit wait to wash time to mesh equipment. The Court found that workers "hose down and scrub aprons, sleeves, rubber gloves," and the evidence indicated an average wait for wash time is required. Wash and clean equipment time will be given to all employees wearing compensable protective equipment.

6. Handle equipment, get ready, put away

Defendant objects to the inclusion of time for "handle equipment, get ready and put away" for all class members. All job categories using compensable equipment on the slaughter or processing floor will be compensated for this time.

7. Wait and Obtain Gloves

Defendant objects to time given to processing employees on the B shift for wait and obtain gloves time, as distribution is different from the A shift. The Court finds that gloves are integral and indispensable, and the wait time is compensable for employees on both processing shifts.

F. Clarifications

Plaintiffs withdrew their request that the Court correct the proposed findings by indicating on Page 6, line 22 that processing employees get a frock after going to their locker room.

Plaintiffs request that the Court amend Page 11, line 5 to indicate a total of 815 class members. The Court will amend the Order with this number.

Plaintiffs request the Court to fill in blank exhibit numbers with specific exhibits they have identified. The Court will supplement the Order with these exhibit numbers.

II. Defendant's Objections

A. Willfulness, Statute of Limitation, Double Damages and Representative Evidence

Defendant objects to the Court's findings on willfulness, the statute of limitation, double damages, and the adequacy of the representative testimony. The Court is not in a posture to reconsider its substantive legal conclusions and will not consider these arguments at this time.

The Court also will not reconsider arguments relating to the factual showings. The Court will address any mistakes or clarifications, but will not consider the same arguments that were made at trial and in motion practice on which a ruling already has been made.

B. Objections Related to Pasco Plant

1. Page 1, Footnote 1: *job classifications are staffed with multiple workers, and workers who work alongside each other . . . using virtually the same equipment.*

The Court rejects Defendant's objection to Page 1, footnote 1 which indicates that job classifications are staffed with multiple workers, and workers who work alongside each other . . . using virtually the same equipment. The Defendant argues that the evidence was that employees wear different types as well as quantities of protective clothing. The entire text of the footnote does not indicate that the Court was concluding that workers who work alongside each other wear virtually identical protective clothing but, rather, that workers who do work side by side have different work code classifications. Additionally, the Court found the representational evidence adequate, and that many class members wear the same equipment.

2. Page 3, line 10-12: *Sunshine pay is extra compensation for working more efficiently and more quickly.*

Defendant objects to this description of Sunshine Pay. The Court rejects this objection, based on the testimony received at trial.

C. Objections Related to "Bargaining History" Section

1. Page 3, line 13: *The majority of workers at IBP's Pasco plant are Hispanic.*

Defendant objects that there was no testimony relating to the overall characteristics of the class. The Court rejects this objection, based on the testimony received at trial.

D. Objections Related to "DOL Litigation"

1. Page 4, line 5-9: *The courts also held IBP liable for unpaid pre-shift and post-shift donning, doffing, and cleaning of special packinghouse industry safety equipment.*

IBP objects that only some equipment was found compensable, and that walking and waiting was found to be not compensable. The Court rejects this objection, as the statement accurately reflects the *Reich* court holding.

2. Page 4-5. Footnote 3: *IBP claimed to have reduced compensable time from 14 minutes to 4 minutes by moving knife distribution and by installing additional equipment washing sinks to reduce waiting time. In late 1998 and early 1999, IBP and DOL negotiated and agreed to 4 minutes of compensation at the non-union plants for pre- and post-shift activities.*

The Court rejects IBP's objection that this mischaracterizes the evidence that the DOL indicated in a stipulation dismissing with prejudice its claims against IBP, that IBP had fully satisfied the DOL.

E. Objections to "Pre- and Post-Shift Activities"

1. Page 6, lines 14-15: *Most Slaughter employees don most of their safety equipment in the locker room.*

The Court rejects IBP's objection that the testimony varied about where employees donned safety equipment. The statement indicates most employees, and the finding was based on adequate representative evidence.

2. Page 6, line 24-26: *Much of the pre-shift routine for processing surrounds the distribution of glove pins with yellow cotton gloves, and protective sleeves and gloves.*

The Court rejects IBP's objection related to the variety of distribution methods. Again, the Court's conclusion was based on adequate representative testimony.

3. Page 7, line 8-9: *A majority of employees do use the restroom during the meal break.*

The Court rejects IBP's objection relating to the adequacy of the representative testimony. Again the Court's conclusion was based on adequate representative testimony.

F. Objections to "Uncompensated Activities"

1. Page 8, line 11-14: *During the 30 minute meal break employees are required to doff and hang up the safety equipment they were wearing before they can begin to use the break as their own time.*

The Court rejects IBP's objection that employees are not required to doff all safety equipment at meal break times, as that is also indicated clearly in the findings.

2. Page 8, line 15-18: *After working on their last piece of meat, the workers are on the production floor and are required to wash their equipment and doff and store their equipment upon returning to their lockers.*

The Court rejects IBP's objection relating to the adequacy of the representative testimony. Again the Court's conclusion was based on adequate representative testimony.

3. Page 9, lines 7-14: *IBP urges that it relied on DOL's exclusion of union plants in this litigation to conclude that clothes changing time was not compensable at union plants . . . (negotiated settlement of 4 minutes clothes changing time).*

The Court rejects IBP's objection that their reliance on DOL includes the *Reich* decision, and that IBP re-engineered their plants to reduce clothes changing time. IBP also objects that referring to the 4 minutes as negotiated implies that it was a compromise of a disputed claim, and that this implication is wrong as this was the reality of how long it took to actually don and doff the protective clothing. The Court rejects these objections as the factual recitation in the Court's

Findings and Conclusions indicates the thrust of IBP's reliance argument at trial and the extra facts relayed by Defendant in this objection are not relevant to the Court's determination that they were not, in fact, relying on DOL. The facts surrounding IBP's claim of reliance are further outlined in the section on Good Faith Reliance.

G. Objections to "Other Claims Re: Noncompensability"

The Court rejects IBP's objections to "Other Claims Re: Noncompensability" as the listed items, arguments by IBP about why certain items are noncompensable, are dealt with elsewhere in the order. The specific arguments listed by IBP in objection are each addressed elsewhere in the Court's proposed Order.

H. Objections to "The Class"

IBP claims there is not a definite class number. The Court is amending the findings to include a total class number of 815, calculated as follows: From Ex. 266-816 opt ins + 5 of the 6 original named Plaintiffs (Pedro Hernandez is #346 on Ex. 266 and should not be counted twice) -5 for five Ex. 266 opt ins stipulated as untimely and -1 Ex. 266 who is double counted (Ms. Hernandez, #'s 338 and 341), for a total of 815 class members.

I. Objections re: Representative Evidence

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions regarding the adequacy of the representative evidence. The Court is not in a posture to reconsider its substantive legal conclusions, and will not consider these arguments at this time.

J. Objections re: Employer Rebuttal

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions regarding the adequacy of IBP's rebuttal of the representational evi-

dence. The Court is not in a posture to reconsider its substantive legal conclusions, and will not consider these arguments at this time.

K. Objections re: Statute of Limitation

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions relating to the statute of limitation and willfulness. The Court is not in a posture to reconsider its substantive legal conclusions, and will not consider these arguments at this time.

L. Objections re: Overtime Under the FLSA

1. Page 17, line 8-10 *re: 29 C.F.R. § 785.7.*

The Court rejects Defendant's objection that the Court does not indicate that the Portal to Portal Act provides an exception for preliminary and postliminary activities.

M. Objections re: Compensable Time

Defendant's objections under this section, based on their argument that there was not adequate representative evidence for these findings, are rejected by the Court.

The Court rejects IBP's objection relating to the adequacy of the representative testimony. Again, the Court's conclusion was that the representational evidence was adequate.

Item 5, which notes that the Court should include hair net in the list at Page 19, line 5-8, is well taken, and hair net will be added to the list of noncompensable activities as is indicated elsewhere in the Findings and Conclusions.

Item 8, which requests clarification re: polar and clean cut gloves. Plaintiffs concede that polar and clean cut gloves are identical, and the Order will be changed to reflect this.

Item 9, which requests clarification regarding cloth gloves. The Court has determined that two cloth gloves will be

awarded to all processing members, and is not limited to only those Plaintiffs who testified at trial.

Item 10 which requests a "*" by hair net and cloth gloves. The Court will add a "*" by hair net. No such amendment will be made for cloth gloves, as the Court has found these to be "integral and indispensable" and compensable.

Item 11, which requests that it be noted at page 21, footnote 9 that no compensation is required at lunch for boots, safety glasses, hard hat, ear plugs, etc. The Court rejects this request, as the point of the footnote is to indicate what is excluded under 3(o), which does not exclude the time during meal periods.

Items 12-22, which request clarification on recovery for certain items for certain job categories. This is dealt with above on the issue of what will be included in damages calculations.

Item 23, Page 23, line 10-11: *IBP furnishes new gloves to the workers on a weekly basis*. IBP objects that there was no evidence on this. The Court recalls this evidence and testimony and rejects this objection.

N. Objections re: walk and wait time

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions regarding walk and wait time. The Court is not in a posture to reconsider its substantive legal conclusions and will not consider these arguments at this time. Many of these objections are considered in the Plaintiffs' objections and requests for clarifications outlined above.

O. Objections re: Meal Breaks

Defendant's objections regarding meal breaks are addressed in the section regarding Plaintiffs' objections. Again, Defendant objects to the recitation that employees are required to

use the restroom. Again, the Court will not reconsider the adequacy of the representative evidence on this issue.

P. Objections re: Affirmative Defenses

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions regarding the adequacy of their affirmative defenses. The Court is not in a posture to reconsider its substantive legal conclusions and will not consider these arguments at this time.

The objections that do not argue legal conclusions are as follows:

1. Page 29, line 4-7. . . *clothes changing is limited to changing into and out of the frock and wash time is limited to washing of the person.*

The Court adopts Defendant's clarification and will include the listed items; hard hat, ear plugs, safety glasses, boots, and hairnet in this excluded category as well.

Q. Objections Re: Portal to Portal

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions regarding the Portal to Portal Act. The Court is not in a posture to reconsider its substantive legal conclusions, and will not consider these arguments at this time.

Item 2: the Court will add hair net to the items excluded under 3(o).

R. Objections re: "Overtime Claims"

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions regarding overtime claims. The Court is not in a posture to reconsider its substantive legal conclusions, and will not consider these arguments at this time.

S. Objections re: Damages

The Court rejects objections by IBP to the legal conclusions in the proposed Findings and Conclusions regarding damages. The Court is not in a posture to reconsider its substantive legal conclusions, and will not consider these arguments at this time.

IBP objects to the Court requiring Plaintiffs to go outside the record to prove damages. This has been addressed in the Court's order striking the Plaintiffs' post-trial declarations.

T. Other Items Not Considered by the Court

1. Four Minutes of Clothing Time Paid Since July 1998.

Plaintiffs indicate that they have given 4 minutes of clothes-changing time credit since July 1998 in their damages calculations. The offset will be expressly referred to in the judgment regarding damages calculations.

2. Form of Judgment

IBP queries whether each individual employee will be a judgment creditor. The Court will enter one judgment, with an overall damages calculation.

3. Occurrence of Simultaneous Activity

IBP argues that many acts are performed simultaneously. The Court adopts Dr. Mericle's findings on the time required for each activity. As the Court's proposed Findings and Conclusions held "[t]he Court acknowledges that there are considerable differences in how and where each employee dons and doffs his or her equipment. Given these differences, the compensable time for each activity is on the basis of a reasonable time, rather than the actual time required for each activity. Evidence of reasonable time was supplied by employee and expert testimony supplied by the Plaintiff, and not rebutted by IBP."

4. Meal Break

IBP requests several clarifications regarding meal-break time, which are addressed above in this order.

5. Preemption

IBP states that the Court does not address federal labor law preemption. This objection is rejected, and the Court refers Defendant to the Proposed Findings at page 28-29. "Union representatives may not bargain away employee rights under the FLSA. *See Featsent v. City of Youngstown*, 70 F.3d 900, 905 (6th Cir. 1995), *citing Walling v. Harnischfeger Corp.*, 325 U.S. 427, 431-32 (1945). The Ninth Circuit has held "that the FLSA's minimum wage and overtime provisions . . . are guarantees to individual workers that may not be waived through collective bargaining." *Albertson's, Inc., v. United Food & Commercial Workers Union, AFL-CIO & CLC*, 157 F.3d 758, 761 (9th Cir. 1998) (*internal quotations omitted*) *citing Locai 246 Utility Workers Union v. Southern Cal. Edison Co.*, 83 F.3d 292 (9th Cir 1996) (holding where employees' claim is based on substantive rights under the FLSA, no resort to arbitration under the CBA is required). *See also Collins v. Lobdell*, 188 F.3d 1124, 1127-28 (9th Cir. 1999) (holding congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement). The Supreme Court also has held that FLSA rights "cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statue and thwart the legislative policies it was designed to effectuate." *Barrantine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981) (*citations omitted.*) Conflicting provisions between FLSA and collective bargaining agreements are resolved in favor of the FLSA. *See id.*"

6. Class certification

IBP requests reconsideration of class certification based on the difficulty in calculating damages. Again, this is based on a

misunderstanding of the Court's proposed findings, and an attempt to distort the concept of individualized damages. The Court is requiring individualized damages calculations in an over-abundance of caution to the Defendant. The Court could have determined that the evidence was sufficient to permit a more generalized damages calculation, but because the evidence and testimony permitted a more discrete determination as to timing by job description, equipment list, and activities testified to, the Court determined that this calculation would lead to a recovery that relates to what work was actually performed. Defendant's objection will be denied based on the findings of adequate representative evidence.

IT IS HEREBY ORDERED:

1. Plaintiffs' Objections and Clarifications to the Court's Proposed Findings *(Ct. Rec. 716)* is *GRANTED in part and DENIED in part, as outlined in the above order.*

2. Defendant's Objections and Clarifications to the Court's Proposed Findings *(Ct. Rec. 793)* is *GRANTED in part and DENIED in part as outlined in the above order.*

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 2nd day of August 2001.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 03-1238

IBP, INC.,
Petitioner

v.

GABRIEL ALVAREZ, Individually and on Behalf of All Others Similarly Situated, et al.

ON PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit, No. 02-35042, 02-35110.

ON CONSIDERATION of the petition for a writ of certiorari herein to the United States Court of Appeals for the Ninth Circuit.

IT IS ORDERED by this Court that the said petition is granted limited to Question 1 presented by the petition. This case is consolidated with No. 04-66 and a total of one hour is allotted for oral argument.

February 22, 2005

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States
By _____
Deputy